IN THE

Supreme Court of the United States

October Term, 1978

No. .....
78-592

ST. VINCENT'S MEDICAL CENTER OF RICHMOND,

Petitioner,

against

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS, BARBARA ANN MACKEY, and PATRICIA P. HAGBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND DEPARTMENT

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND DEPARTMENT

Petitioner, St. Vincent's Medical Center of Richmond ("St. Vincent's"), respectfully prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Supreme Court of New York, Second Department.

Opinions Below

The opinion of the Appellate Division of the Supreme Court of New York, Second Department, is officially reported at 59 AD2d 778 and is set forth in App. A, *infra*, p. A1. The decision of the State Human Rights Appeal Board, and the decision and order of the Commissioner of the State Division of Human Rights made in this case are unreported and are set forth in App. B and C, respectively, *infra*, pp. A2-A6, A7-A16.

Jurisdiction

The final order of the Appellate Division of the Supreme Court of New York, Second Department (App. D, *infra*, pp. A17-A18) was made and entered on October 31, 1977. By its decision made on July 11, 1978, the New York Court of Appeals denied without opinion petitioner's timely application for leave to appeal such order (App. E, *infra*, p. A19).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

In *General Electric Company* v. *Gilbert*,[1] this Court determined that the exclusion of pregnancy-related disabilities from an employer's disability benefits plan did not violate the federal Civil Rights Act of 1964 because it did not constitute discrimination on the basis of sex. Two weeks later the New York Court of Appeals in *Brooklyn*

1. 429 U.S. 125 (1976).

Union Gas Co. v. *New York State Human Rights Appeal Board*,[2] decided that such an exclusion did constitute sex-discrimination and therefore violated the New York State Human Rights Law. On the authority of that latter decision the Appellate Division of the Supreme Court of New York, Second Department, held that St. Vincent's disability benefits plan violated the New York civil rights statute because it excluded pregnancy-related disabilities. The New York Court of Appeals denied petitioner's application for leave to appeal. The questions presented are:

Whether the New York State Human Rights Law, insofar as it has been construed by that state's highest court in 1976 to prohibit as sex discrimination the failure of an employer in interstate commerce to include coverage of pregnancy-related disabilities in its employee disability benefits plan, is invalid under Article VI, §2 of the Constitution of the United States, in that it

(a) is pre-empted by the Federal Employee Retirement Income Security Act of 1974 (ERISA), and, in any event,

(b) is inconsistent with the provisions of the federal Civil Rights Act of 1964, as construed by this Court, and therefore pre-empted by Section 1104 of that Act.

2. 41 NY2d 84 (1976).

Statutes and Constitutional Provisions Involved

United States Constitution, Article VI, §2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The provisions of Sections 4 and 514 of the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§1003 and 1144 are set forth at App. F, *infra,* pp. A20-A22.

Section 1104 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000h-4:

"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof."

The relevant portion of Section 296 of the New York Human Rights Law, Article 15, Executive Law, is set forth below:

"§296. Unlawful discriminatory practices

1. It shall be an unlawful discriminatory practice:

(a) For an employer or licensing agency because of the age, race, creed, color, national origin, sex or disability or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Statement of the Case

This consolidated case grows out of the filing of complaints with the New York State Division of Human Rights by two female employees of St. Vincent's in November and December, 1972. Both complaints alleged that St. Vincent's had discriminated against the employees on the basis of their sex in violation of the New York State Human Rights Law by failing to provide them with disability benefits for the time they were disabled by pregnancy although disability benefits are paid by St. Vincent's in the case of other non-occupational disabilities.

A consolidated hearing was held by the State Division of Human Rights and in each case, the Commissioner of the Division of Human Rights found that St. Vincent's, by its exclusion of pregnancy from its non-occupational sickness and accident plan, had discriminated against complainants on the basis of their sex in violation of the New York Human Rights Law. The Commissioner ordered, *inter alia,* that St. Vincent's provide disability benefits to female employees for pregnancy-connected disabilities to the same

extent it provides such benefits to employees for other types of temporary physical disabilities (App. C, *infra*, pp. A7-A16).

A timely appeal from the Commissioner's Decision and Order was filed with and heard by the New York State Human Rights Appeal Board. By a Decision and Order dated December 29, 1975, but mailed August 24, 1976, the Appeal Board affirmed the order of the Commission. (App. B, *infra*, pp. A2-A4).

Thereafter, and pursuant to the provisions of the New York Human Rights Law, St. Vincent's by a petition instituted a special proceeding in the Appellate Division of the Supreme Court of New York, Second Department, to review and set aside the decisions and orders of the Appeal Board and of the Commissioner on the ground, among others, that the decisions and orders are not in conformity with the laws of the United States.

At the hearing on the petition and in briefs submitted to the court in connection with such hearing both parties argued the questions raised in the petition whether the New York Human Rights Law, as interpreted by the New York Court of Appeals and applied against St. Vincent's in this consolidated case, violates the Supremacy Clause of the Constitution because it is preempted by the provisions of ERISA and by the provisions of the federal Civil Rights Act of 1964. The Appellate Division of the Supreme Court of New York, Second Department, rendered an opinion (App. A, *infra*, p. A1) expressly rejecting St. Vincent's claim of federal preemption and entered its order (App. D, *infra*, pp. A17-A18) confirming the orders of the State

Human Rights Appeal Board and dismissing St. Vincent's petition. Thereafter St. Vincent's filed a timely notice of appeal as of right to the New York Court of Appeals and on April 4, 1978 the New York Court of Appeals granted an order dismissing the appeal on the ground that since "no substantial constitutional question is directly involved," the New York Civil Practice Law and Rules did not authorize an appeal as of right in the circumstances. Thereupon St. Vincent's filed with the New York Court of Appeals a timely petition for leave to appeal which by its order dated and entered July 11, 1978 (App. E, *infra*, p. A19) the New York Court of Appeals denied without opinion.

Reasons for Granting the Writ

The decision of the state court below should be reviewed because it has decided two federal questions of substance not previously determined by this Court and has decided each of the two questions in a way that is in direct conflict with the decisions of courts in other states. The first such question involves the interpretation of the preemption provisions of ERISA and a determination whether those provisions prohibit a state from regulating employee benefit plans by applying to them state employment discrimination laws that differ from the comparable federal laws. The second federal question, which arises only if ERISA is construed as permitting such application, requires a determination whether a state law, construed as declaring the exclusion of pregnancy-related disabilities from an employer's disability benefit plan to be sex discrimination, is in that respect inconsistent with the federal Civil Rights Act of 1964, as construed by this Court, and is therefore preempted.

The importance of these federal questions is emphasized by the time and attention the Congress devoted to the subject of preemption in fashioning its comprehensive regulation of employee benefit plans in ERISA. Such importance is heightened by the fact that at least 42 states have comprehensive employment discrimination laws that potentially could be applied to multi-state employee benefit plans in ways that differ from federal regulations as well as from each other.

When the Congress enacted the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 *et seq.*, it made it abundantly clear that it intended to supersede and exclude any regulation of employee benefit plans—whether of the pension or welfare variety—by any individual state law, except in the narrowest or most indirect circumstances. Thus, Section 514 of the Act, 29 U.S.C. §1144(a), expressly provides:

> "Except as provided in subsection (b) of this section, the provisions of this subchapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

The scope of the preemption Congress intended to accomplish regarding employee benefit plans, and the importance it attached to that accomplishment, are made clear in the Congressional reports and debates that form the legislative history of the Act.

The Conference Committee Report to the House and Senate concerning the preemption provisions that became

Section 514 of the Act explained the proposed legislation in part as follows:

> "Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. (However, following title I generally, preemption will not apply to government plans, church plans not electing under the vesting, etc., provisions, workmen's compensation plans, non-U.S. plans primarily for nonresident aliens, and so-called 'excess benefit plans.').
>
> * * *
>
> "The preemption provisions of title I are not to exempt any person from any State law that regulates insurance, banking or securities. However, the substitute generally provides that an employee benefit plan is not to be considered as an insurance company, bank, trust company, or investment company (and is not to be considered as engaged in the business of insurance or banking) for purposes of any State law that regulates insurance companies, insurance contracts, banks, trust companies, or investment companies. This rule does not apply to a plan which is established primarily to provide death benefits; such plans, of course, may be regulated under the State insurance, etc., laws. H.C.R. No. 93-1280, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 5038, 5162."

Speaking in support of the bill that emanated from the Senate-House Conference Committee and became the Act, Congressman Dent stated:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of *the sole power to regu-*

late the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

* * *

"The conferees, with the narrow exceptions specifically enumerated, applied this principle *in its broadest sense* to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach *any* rule, regulation, practice or decision of any State, . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b)." 120 Cong. Rec. 29197 (1974) (emphasis added).

Senator Williams made a similar statement to the Senate:

"It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply *in its broadest sense* to all actions of State or local government, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29933 (1974) (emphasis added).

Senator Javits, a leading sponsor of ERISA, made the following statement in explaining the preemption provision and why total preemption, rather than limited preemption, was adopted by the Conference Committee:

"Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the

bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulations, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

"Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans *required*—but for certain exceptions—the *displacement of State action in the field of private employee benefit programs.*" 120 Cong. Rec. 29942 (1974) (emphasis added).

Viewed against the background of this legislative history any question concerning the applicability of a particular state law to the employee benefit plans of employers in interstate commerce becomes a substantial federal question. This is particularly so when, as here, the question involves the applicability to employee benefit plans covered by ERISA of state employment practices acts, because of the great proliferation and variety of such state acts and the manner in which many of them differ from the provisions of the federal anti-discrimination laws and from each other.

An analysis of state employment practices laws reveals that many go beyond the federal proscriptions of discrimination in employment on the basis of race, religion, color, sex and age. As Appendix G, *infra* (pp. A23-A26) shows, there are at least 35 states that prohibit discrimination by private employers on the basis of handicap; 19 states out-

law discrimination on the basis of ancestry; and 15 states make illegal discrimination on the basis of marital status. Some states also proscribe one or more of the following as a basis for discrimination in employment: height, weight, status with regard to public assistance, place of birth, unfavorable discharge from miltary service, and family relationship. Further, in dealing with age as a basis for discrimination, at least 20 states include in the protected group individuals whose ages do not qualify them for protection under the federal Age Discrimination in Employment Act, 29 USC §621 et seq. Absent preemption each of these state statutory provisions has the potential of making illegal in a particular state a pension or welfare plan covered by and in full compliance with federal law.

Even with respect to those provisions of state employment practices laws that do not differ from the corresponding provisions of Title VII there is a great potential for state rulings that conflict with federal laws on the same subject. Thus, at least 19 states that proscribe sex discrimination in employment have adopted guidelines that are inconsistent with this Court's decision in *Gilbert* v. *General Electric Company, supra.*[3] But the potential for confusion between state and federal regulation is not limited to the area of disability benefit plans. For example, the many thousands of employers in interstate commerce, who by reason of this Court's determination in *City of Los Angeles, Department of Water and Power* v. *Manhart,* 98 S. Ct. 1370 (1978) must require male employees to contribute to their

3. California, Colorado, Iowa, Kansas, Maine, Maryland, Massachusetts, Missouri, Montana, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Washington and Wisconsin.

pension plans in the same amounts as female employees, must now anticipate the possibility that a pension plan so structured in compliance with Title VII may be found by one or more state courts to violate their local anti-discrimination law on the basis of a disparate impact theory that this Court rejected in the *Manhart* case. When one considers that in 1974 almost one-half of the employees in private non-farm work force were covered by employee benefit plans of the pension variety[4] it is clear that the application of state employment practices laws to employee benefit plans covered by ERISA presents a substantial and important question for this Court to determine.

The importance of the second federal question, involving the interpretation and application of Section 1104 of the federal Civil Rights Act of 1964 in the circumstances of this case, depends of course on the final answer to the first federal question that this case presents. If (as petitioner believes to be unlikely) this Court should construe ERISA as permitting the application of New York's anti-discrimination law to the disability benefits plan of St. Vincent's, there would arise the substantial and important question whether the New York anti-discrimination law, in outlawing as sex discrimination the exclusion of pregnancy disability benefits from an employee disability benefits plan, is inconsistent with (and therefore preempted by) the federal Civil Rights Act of 1964 which declares such exclusion not to be sex discrimination at all.

This Court has twice dealt with the exclusion of pregnancy disabilities from coverage under employee disability benefits plans, and both times it expressly held that such an exclusion does not constitute sex discrimination at all.

4. H.R. Rep. (Education and Labor Committee) No. 93-533, 93rd Cong., 2nd Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News, 4639, 4641.

Geduldig v. *Aiello*, 417 U.S. 484 (1974); *General Electric Company* v. *Gilbert*, 429 U.S. 125 (1976). Notwithstanding the federal law on the subject, in at least 19 states the employment discrimination laws either expressly or by interpretation characterize such exclusion of pregnancy disabilities as sex discrimination and proscribe the exclusion on that basis.[5] In the case of New York the Court of Appeals in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board*, 41 NY2d 84 (1976), considered and expressly refused to follow this Court ruling in *General Electric Company* v. *Gilbert, supra*, even though it admitted that the pertinent parts of Title VII that this Court construed "are substantially identical" to those of the New York Human Rights Law then before that court. Since most of the 50 states have laws that prohibit "sex discrimination," the question whether each of them is free to apply the term to employers in interstate commerce in a manner that conflicts with federal law on the subject is of great importance to every multi-state employer in the nation.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Of Counsel

5. See footnote 3, *supra*.

APPENDICES

APPENDIX A

Opinion of the Appellate Division of the Supreme Court of New York, Second Department Dated October 18, 1977

A—October 18, 1977

2138 E — St. Vincent's Medical Center of Richmond, petitioner, v. State Human Rights Appeal Board et al., respondents.

Kelley Drye & Warren, New York, N.Y. (Roger J. Karlebach and Frederick T. Shea of counsel), for petitioner.

Beverly Gross, New York, N.Y. (Ann Thacher Anderson of counsel), for respondent State Division of Human Rights.

Proceeding pursuant to section 298 of the Executive Law to review an order of the State Human Rights Appeal Board, dated December 29, 1975, which affirmed an order of the State Division of Human Rights, dated May 2, 1975, which found, *inter alia,* that the petitioner had discriminated against the complainants on the basis of their sex with respect to the terms, conditions and privileges of employment.

Determination confirmed and proceeding dismissed on the merits, without costs or disbursements.

The disallowance of pregnancy-related disabilities violated section 296 (subd. 1, par. [a]) of the Human Rights Law (Executive Law, art. 15) (see *Brooklyn Union Gas Co.* v *New York State Human Rights Appeal Bd.,* 41 NY2d 84). We have considered the petitioner's other arguments and have found them to be without merit.

HOPKINS, J.P., COHALAN, MARGETT and HAWKINS, JJ., concur.

APPENDIX B

Decision of the New York State Human Rights Appeal Board, Dated December 29, 1975

STATE OF NEW YORK:
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Case Nos. CSF-28662-72 & CS-28917-72

Appeal No. 2819

BARBARA ANN MACKEY,
Complainant-Respondent,
vs.

ST. VINCENT'S MEDICAL CENTER OF RICHMOND, *Respondent-Appellant* & BENEFICIAL NATIONAL LIFE INSURANCE CO.,
Respondent.

STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF PATRICIA P. HAGBERG,
Complainant-Respondent,
vs.

ST. VINCENT'S MEDICAL CENTER OF RICHMOND,
Respondent-Appellant,

JAMES DORAN, Dir. of Personnel, FLORENCE ZARNICK, Dir. of Nurses; & BENEFICIAL NATIONAL LIFE INS. CO.,
Respondents.

Appendix B

This is an appeal from a Decision and Order of the Commissioner of the State Division of Human Rights, dated May 2, 1975, finding that the above named respondents had committed an unlawful discriminatory act relating to employment because of their sex in violation of the Human Rights Law of the State of New York. The respondent-appellant is St. Vincent's Medical Center of Richmond.

The record shows that respondent, St. Vincent's Medical Center of Richmond discriminated against the complainants because of their sex, in the terms, conditions and privileges of employment, in violation of the Human Rights Law.

The facts of these consolidated cases are undisputed on this appeal.

The sole legal question presented on this appeal is whether the New York State Human Rights Law mandates that an employer must provide its employees with the same insurance coverage for disabilities due to pregnancy which the Workman's Compensation Law of the State requires the employer to provide to its employees for disabilities arising from other causes.

It is the decision of this Board, that an employer cannot administer contractual benefits in a way which materially differentiates between maternity related disabilities and other non-occupational disabilities.

Appendix B

The record taken as a whole substantially supports the findings and decision of the Commissioner, and they are, accordingly, in all respects affirmed.

Dated: December 29, 1975
Mailed: August 24, 1976

STATE HUMAN RIGHTS APPEAL BOARD

By: EDWARD MORRISON

EDWARD MORRISON
Presiding Member

The following members concur in the foregoing decision and opinion:

Hon. Irma Vidal Santaella (separate concurring opinion)

Hon. Thomas A. Conniff

Appendix B

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

Concurring Opinion

Case Nos. CSF-28662-72 & CS-28917-72

Appeal No. 2819

STATE DIVISION OF HUMAN RIGHTS on the Complaint of BARBARA ANN MACKEY,
Complainant-Respondent,
vs.

ST. VINCENT'S MEDICAL CENTER OF RICHMOND, *Respondent-Appellant* & BENEFICIAL NATIONAL LIFE INSURANCE CO.,
Respondent.

STATE DIVISION OF HUMAN RIGHTS ON THE COMPLAINT OF PATRICIA P. HAGBERG,
Complainant-Respondent,
vs.

ST. VINCENT'S MEDICAL CENTER OF RICHMOND,
Respondent-Appellant,

JAMES DORAN, Dir. of Personnel, FLORENCE ZARNICK, Dir. of Nurses; & BENEFICIAL NATIONAL LIFE INS. CO.,
Respondents.

With respect to the basic issue before this Board on whether the Order of the Commissioner of the State Divi-

sion of Human Rights is supported by substantial evidence on the whole record, examination of the record indicates that the evidentiary facts elicited by the Division amply supports the findings of fact on which the Order of the Commissioner is based. Accordingly, the Order appealed from is binding and conclusive on this Board (*Matter of Kindt* v. *State Commission of Human Rights,* 44 Misc. 2d 896, mod. on other grounds, 23 AD 2d 809, aff'd 16 N.Y. 2d 1001; *Castle Hill Beach Club, Inc.* v. *Arbury,* 2 N.Y. 2d 296 [1957] and *Holland* v. *Edwards,* 307 N.Y. 38), and it should be affirmed in all respects.

Dated: December 29, 1975
Mailed: August 24, 1976

/s/ Irma Vidal Santaella
Irma Vidal Santaella

The following member concurs in the foregoing opinion:
Hon. Thomas A. Conniff

APPENDIX C

Decision and Order of the Commissioner of the New York State Division of Human Rights

STATE OF NEW YORK
Executive Department
State Division of Human Rights

Case Nos. CSF-28662-72; CS-28917-72

State Division of Human Rights
on the complaint of
Barbara Ann Mackey,
Complainant,

against

St. Vincent's Medical Center of Richmond;
and Beneficial National Life Insurance Company,
Respondents.

State Division of Human Rights
on the complaint of
Patricia P. Hagberg,
Complainant,

against

St. Vincent's Medical Center of Richmond;
James Doran, Director of Personnel,
Florence Zarnick, Director of Nurses;
and Beneficial National Life Insurance Company,
Respondents.

Appendix C

PROCEEDINGS IN THE CASE

On the 14th day of November, 1972, Complainant Barbara Ann Mackey and on the 27th day of December, 1972, Complainant Patricia P. Hagberg, each filed a verified complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with unlawful discriminatory practices relating to employment in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

After investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondents had engaged in unlawful discriminatory practices. The Division thereupon referred the cases to public hearing.

After due notice, the cases came on for a consolidated hearing before Jose Ramon Torres, Esq., a Hearing Examiner of the Division. Sessions of the hearing were held on March 14, and April 23, 1973. Thereafter, the hearing was concluded on February 1, 1974, before Mathew Foner, Esq., another Hearing Examiner of the Division.

At the hearing Complainants and Respondents appeared. Respondents St. Vincent's Medical Center of Richmond, James Doran and Florence Zarnick were represented by Kelley, Drye, Warren, Clark, Carr & Ellis, Esqs., by Joel A. Forkosch, Esq., of Counsel. Respondent Beneficial Life Insurance Company was represented by Bobroff, Olonoff & Scharf, Esqs., Herbert L. Scharf, Esq., of Counsel. The Division was represented by Henry Spitz, Esq., General Counsel, by Elaine Berger, Esq., of Counsel.

Appendix C

FINDING OF FACTS

1. Complainant Barbara Ann Mackey, a female, has been employed as a registered nurse by Respondent St. Vincent's Medical Center of Richmond (hereinafter "St. Vincent's") since September, 1964.

2. Complainant Patricia P. Hagberg, a female, has been employed as a registered nurse by Respondent St. Vincent's since October, 1970.

3. At all times herein pertinent, Respondent James Doran was Director of Personnel, and Respondent Florence Zarnick was Director of Nursing Services of Respondent St. Vincent's.

4. At all times herein pertinent, Respondent Beneficial National Life Insurance Company, a New York insurance carrier, (hereinafter "Beneficial") insured Respondent St. Vincent's as required by the New York State Workmen's Compensation Law.

5. Complainant Mackey became pregnant and voluntarily commenced a maternity leave on April 17, 1972, to extend to October, 1972. Her child was born May 9, 1972. She was advised by her obstetrician that she should be examined by him six weeks *post partum*. Her examination was on July 7, 1972 and she was told that she was physically fit to return to work.

6. Complainant Hagberg became pregnant and voluntarily commenced a maternity leave on December 1, 1972.

Her child was born February 12, 1973. She was advised by her obstetrician that she should be examined by him six weeks *post partum*. Her examination was on April 18, 1972 and she was told that she was physically fit to return to work.

7. Each Complainant received all her accrued fringe benefits, including accrued sick leave, when she took her maternity leave of absence.

8. Respondent St. Vincent's carries insurance with Respondent Beneficial, covering disabilities sustained by employees in consequence of illness or involuntary injury, as set forth in its disability benefits insurance policy. Such insurance coverage excludes benefits for any period of disability caused by or arising in connection with a pregnancy, except any such period occurring after return to employment, as provided.

9. Respondent St. Vincent's provides no benefits to any employee for temporary disability other than those provided by its insurance policy with Respondent Beneficial.

10. Complainant Mackey filed with Respondents St. Vincent's and Beneficial for disability benefits for the period April 14, 1972 to July 7, 1972. She testified that she was disabled "from April 17, . . . to about four to six weeks" following delivery.

11. Complainant Hagberg filed with Respondent St. Vincent's for disability benefits for the period December 1,

1972 to May 1, 1973. She testified that she was disabled from January 3, 1973 until six weeks following delivery.

12. The Complainants' claims were rejected. Neither Complainant received disability benefits from her employer, for any of the aforesaid time period.

13. Under the Human Rights Law, employers must treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom, as temporary disabilities under any health or temporary disabiltity insurance or sick leave plan available in connection with employment.

14. The exclusion of disability benefits for pregnancy-connected disability in the Workmen's Compensation Law, Section 200 et seq., relates to payment of benefits pursuant to that statute, and does not preclude the equal treatment of women in the terms, conditions and privileges of employment established under the Human Rights Law.

15. Respondent St. Vincent's Medical Center unlawfully discriminated against the Complainants because of their sex, in the terms, conditions and privileges of their employment, by failing to pay them disability benefits for any portion of the time they were temporarily disabled from work by reason of pregnancy to the same extent it provides such paid sick leave and disability benefits to other employees for non-pregnancy connected disabilities.

16. Respondent St. Vincent's Medical Center unlawfully discriminates against its female employees in the terms,

conditions and privileges of their employment, by failing to provide benefits to employees who are unable to work because of pregnancy or pregnancy-related disability to the same extent it provides such benefits to employees unable to work because of non-pregnancy connected disabilities.

17. There is insufficient medical evidence to establish that Complainant Mackey was physically unable to work on and beyond April 17, 1972, the date she commenced her maternity leave. Upon the instant record, said Complainant could have continued working until the day before her child was born, May 9, 1972.

18. There is insufficient medical evidence to establish that Complainant Mackey was physically unable to resume work prior to her *post partum* examination. Upon the instant record, said Complainant could have resumed her work, without physical disability, on or about June 6, 1972.

19. There is insufficient medical evidence to establish that Complainant Hagberg was physically unable to work on and beyond December 1, 1972, the date she commenced her maternity leave. Upon the instant record, said Complainant could have continued working until the day before her child was born, February 12, 1973.

20. There is insufficient medical evidence to establish that Complainant Hagberg was physically unable to resume work prior to her *post partum* examination. Upon the instant record, said Complainant could have resumed her work, without physical disability, on or about March 13, 1973.

21. Complainant Hagberg, who named James Doran and Florence Zarnick as Respondents in her verified complaint, acknowledged that said Respondents did not unlawfully discriminate against her. Complainant Mackey did not file charges against said persons. There is no evidence that said Respondents, or either of them, discriminated against either Complainant.

22. There is insufficient evidence that Respondent Beneficial aided and abetted Respondent St. Vincent's in its discriminatory policy of not providing disability benefits to the Complainants for their pregnancy-related disabilities.

Decision

On the basis of the foregoing, I find that Respondent St. Vincent's Medical Center of Richmond discriminated against the Complainants because of their sex, in the terms, conditions and privileges of employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that Respondent St. Vincent's Medical Center of Richmond discriminates against its female employees, because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainants will effectuate the purposes of the Human Rights Law.

On the basis of the foregoing, I further find that Respondent Beneficial National Life Insurance Company did

not aid, abet, incite, compel or coerce Respondent St. Vincent's Medical Center of Richmond to discriminate against the Complainants or its female employees, because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

On the basis of the foregoing, I further find that Respondents James Doran and Florence Zarnick did not discriminate against the Complainants because of their sex, in the terms, conditions and privileges of their employment, in violation of the Human Rights Law.

ORDER

On the basis of the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the instant complaints as to Respondent Beneficial National Insurance Company, be and the same are hereby dismissed, and it is further

ORDERED, that the instant complaints as to Respondents James Doran and Florence Zarnick, be and the same are hereby dismissed, and it is further

ORDERED, that the Respondent St. Vincent's Medical Center of Richmond, its agents, representatives, employees, successors and assigns shall cease and desist from discriminating against any employee or individual in the terms, conditions and privileges of employment because of the sex of such person, and it is further

ORDERED, that the Respondent St. Vincent's Medical Center of Richmond, its agents, representatives, employees,

successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. The Respondent shall within 30 days from the date this Order becomes effective, pay to Complainant Barbara Ann Mackey disability benefits for the period May 8, 1972 through June 5, 1972, to the same extent such payments are made to its other employees for non-pregnancy connected temporary physical disabilities, plus interest at the rate of six percent per annum from May 22, 1972, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had she been granted disability benefits for the above-stated period. Respondent shall furnish proof of such payment within ten days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

2. The Respondent shall within thirty (30) days from the date this Order becomes effective, pay to Complainant Patricia P. Hagberg disability benefits for the period February 11, 1973 through March 13, 1973, to the same extent such payments are made to its other employees for non-pregnancy connected temporary physical disabilities, plus interest at the rate of six percent per annum from February 26, 1973, a reasonable intermediate date in accordance with Section 5001(b) of the CPLR. Respondent shall restore to Complainant all other rights, benefits and privileges to which she would have been entitled had she been granted

disability benefits for the above-stated period. Respondent shall furnish proof of such payment within ten days thereof to the State Division of Human Rights, 270 Broadway, New York, New York 10007, Attention Legal Bureau.

3. The Respondent shall provide disability benefits to female employees for pregnancy-connected disabilities to the same extent it provides such benefits to employees for other types of temporary physical disabilities.

4. The Respondent shall send a memorandum to all supervisory employees, agents, officers and to all recognized unions instructing them that it has a policy of nondiscrimination because of sex in the treatment of employees; and that such supervisory employees, agents and/or representatives are required to implement said policy.

5. The Respondent shall make available to the duly-authorized representatives of this Division such documents and information as may be necessary for the Division to ascertain whether there is compliance with this Order.

Dated: May 2, 1975
New York, New York

STATE DIVISION OF HUMAN RIGHTS

/s/ WERNER H. KRAMARSKY

Werner H. Kramarsky, Commissioner

APPENDIX D

Order of the Appellate Division of the Supreme Court of New York, Second Department, Dated October 31, 1977

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 31, 1977.

Hon. JAMES D. HOPKINS, Justice Presiding,
Hon. JOHN P. COHALAN, JR.,
Hon. CHARLES MARGETT,
Hon. JOSEPH F. HAWKINS, *Associate Justices.*

St. Vincent's Medical Center of Richmond,
Petitioner,

v.

State Human Rights Appeal Board et al.,
Respondents.

A proceeding having been instituted in this court, pursuant to section 298 of the Executive Law by petition of St. Vincent's Medical Center of Richmond, verified September 23, 1976, to review an order of the State Human Rights Appeal Board, dated December 29, 1975, which affirmed an order of the State Division of Human Rights, dated May 2, 1975, which found, *inter alia,* that the peti-

Appendix D

tioner had discriminated against the complainants on the basis of their sex with respect to the terms, conditions and privileges of employment; the respondent State Division of Human Rights having filed an answer thereto;

Now, upon the said petition; the brief of petitioner; the said answer and brief of the respondent State Division of Human Rights; and upon all the papers filed herein; and the proceeding having been argued by Roger J. Karlebach, Esq., of counsel for the petitioner and argued by Ann Thacher Anderson, Esq., of counsel for the respondent State Division of Human Rights, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is unanimously

ORDERED that the determination is hereby confirmed and the proceeding dismissed on the merits, without costs or disbursements.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division

APPENDIX E

Decision slip of the New York State Court of Appeals Denying Leave to Appeal, Dated July 11, 1978

3 Mo. No. 491

St. Vincent's Medical Center of Richmond,
Appellant,

vs.

State Human Rights Appeal Board, State Division of Human Rights, Barbara Ann Mackey, and Patricia P. Hagberg,
Respondents.

Westinghouse Electric Corporation,
Appellant,

vs.

State Human Rights Appeal Board and State Division of Human Rights on the Complaints of Donna J. Sterling & ors.,
Respondents.

Motion for leave to appeal &c. denied with twenty dollars costs and necessary reproduction disbursements. Fuchsberg, J., taking no part.

DECISION COURT OF APPEALS
JUL 11 1978

APPENDIX F

Sections 4 and 514 of the Employees Retirement Income Security Act, 29 U.S.C. §§1003 and 1144

Section 4 of the Employees Retirement Income Security Act, 29 U.S.C. §1003, contains the following provisions:

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

(b) The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 2003(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26;

(3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws;

(4) such plan is maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; or

(5) such plan is an excess benefit plan (as defined in section 1002(36) of this title) and is unfunded.

Section 514 of the Employees Retirement Income Security Act of 1974, 29 U.S.C. 1144, contains the following provisions:

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an

insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

APPENDIX G

Analysis of State Fair Employment Practice Laws

[All citations are to the Fair Employment Practices Manual published by the Bureau of National Affairs, Volume 8A]

1. States Proscribing Discrimination on the Basis of Handicap

Alaska—Page 453:205 et seq., §18.80.220
California—Page 453:805 et seq., §1420
Colorado—Page 453:1005 et seq., §24-34-306
Connecticut—Page 453:1205 et seq., §31.126
Florida—Page 453:1805 et seq., §13.261
Hawaii—Page 453:2205 et seq., §378-2
Illinois—Page 453:2605 et seq., §3
Indiana—Page 453:2805 et seq., §22-9-1-2
Iowa—Page 453:3005 et seq., §601A.6
Kansas—Page 453:3201 et seq., §44-1009
Kentucky—Page 455:51 et seq., §207.130 et seq.
Maine—Page 455:405 et seq., §4572
Maryland—Page 455:605 et seq., §16
Massachusetts—Page 455:805 et seq., §4
Michigan—Page 455:1005 et seq., Article 2, §202
Minnesota—Page 455:1205 et seq., §363.03
Montana—Page 455:1805 et seq., §64-304
Nebraska—Page 455:2005 et seq., §48-1104
Nevada—Page 455:2205 et seq., §613.330
New Hampshire—Page 455:2405 et seq., §354-A:2
New Jersey—Page 455:2605 et seq., §10:5-4.1
New Mexico—Page 455:2805 et seq., §4-33-7
New York—Page 455:3005 et seq., §296

North Carolina—Page 455 :3205 et seq., §143-416.2
Ohio—Page 457 :205 et seq., §4112.02
Oregon—Page 457 :605 et seq., §659.400
Pennsylvania—Page 457 :805 et seq., §955
Rhode Island—Page 457 :1205 et seq., §28-5-7
Tennessee—Page 457 :1855 et seq., §1
Texas—Page 457 :2015 et seq., §1 et seq.
Vermont—Page 457 :2405 et seq., §498
Virginia—Page 457 :2651, §40.1-28.7
Washington—Page 457 :2805 et seq., §49.60.180
West Virginia—Page 457 :3005 et seq., §5-11.9
Wisconsin—Page 457 :3205, §111.32

2. States Proscribing Discrimination on the Basis of Ancestry

California—Page 453 :805 et seq., §1420
Colorado—Page 453 :1005 et seq., §24-34-306
Connecticut—Page 453 :1205 et seq., §31-126
Illinois—Page 453 :2205 et seq., §378-2
Kansas—Page 453 :320 et seq., §44-1009
Maine—Page 455 :405 et seq., §4572
Maryland—Page 455 :605 et seq., §16
Massachusetts—Page 455 :805 et seq., §4
Missouri—Page 455 :1605 et seq., §296.020
New Jersey—Page 455 :2605 et seq., §10 :15-12
New Mexico—Page 455 :2805 et seq., §4-33-7
New York—Page 455 :3005 et seq., §291
Ohio—Page 457 :205 et seq., §4112.02
Pennsylvania—Page 457 :805 et seq., §955

Rhode Island—Page 457 :1205 et seq., §28-5-7
South Dakota—Page 457 :1605 et seq., §20-13-10
Vermont—Page 457 :2405 et seq., §495
West Virginia—Page 457 :3005 et seq., §5-11.9
Wyoming—Page 457 :3405 et seq., §27-261

3. States Proscribing Discrimination on the Basis of Marital Status

Alaska—Page 453 :205 et seq., §18.80.220
California—Page 453 :805 et seq., §1420
Connecticut—Page 453 :1205 et seq., §31-26
Florida—Page 453 :1805 et seq., §13.261
Hawaii—Page 453 :2205 et seq., §378-2
Maine—Page 455 :405 et seq., §4572
Maryland—Page 455 :605 et seq., §16
Michigan—Page 455 :1005 et seq., Article 2, §202
Minnesota—Page 455 :1205 et seq., §363.03
Nebraska—Page 455 :2005 et seq., §48-1104
New Hampshire—Page 455 :2405 et seq., §354-A :2
New Jersey—Page 455 :2605 et seq., §10 :15-12
New York—Page 455 :3005 et seq., §296
Oregon—Page 457 :605 et seq., §659.010(14)
Washington—Page 457 :2805 et seq., §49.60

4. States Proscribing Miscellaneous Discriminatory Practices

Height and Weight

Michigan—Page 455 :1005 et seq., Article 2, §202

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Status With Regard to Public Assistance
Minnesota—Page 455 :1205 et seq., §363.03

Place of Birth
Vermont—Page 457 :2405 et seq., §495

Unfavorable Discharge From Military Service
Illinois—Page 453 :2205 et seq., §378-2

Family Relationship
Oregon—Page 457 :605 et seq., §659.400

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-592

ST. VINCENT'S MEDICAL CENTER OF RICHMOND,

Petitioner,

against

STATE HUMAN RIGHTS APPEAL BOARD, STATE DIVISION OF HUMAN RIGHTS, BARBARA ANN MACKEY, and PATRICIA P. HAGBERG,

Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

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TABLE OF AUTHORITIES

Cases:

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Respondents.

BRIEF FOR RESPONDENT STATE DIVISION OF HUMAN RIGHTS IN OPPOSITION

Question Presented

In view of (1) the inapplicability of the Employee Retirement Income Security Act of 1974 (ERISA) to causes of action which arose before January 1, 1975; (2) the exclusion from the supersedure clause in ERISA of employee benefit plans maintained solely to comply with State disability benefit laws; and (3) the provisions in the Civil

Rights Act of 1964 which preserve State fair employment legislation providing more comprehensive protection to employees than what was afforded by Title VII before its amendment on October 31, 1978, does the Supremacy Clause invalidate a decision of the Appellate Division* requiring petitioner to provide to employees disabled in any way connected with pregnancy fringe benefits equivalent to those provided by petitioner uniformly to employees disabled by other temporary nonoccupational disabilities?

Statement of the Case

Petitioner would have this Court review application of New York's fair employment legislation, N.Y. Executive Law Article 15 (McKinney's 1972), hereinafter "the Human Rights Law," to a New York-based employer which in 1972 and 1973 disallowed to employees disabled in connection with pregnancy and childbirth fringe benefits provided by petitioner uniformly to employees disabled by other temporary nonoccupational disabilities.

After investigation and a public hearing under the Human Rights Law, the State Division of Human Rights issued an order finding petitioner's practice discriminatory as to sex, and directing petitioner to cease and desist and to provide, for employees disabled in any way connected with pregnancy, fringe benefits equivalent to those provided for employees disabled by nonoccupational injury or illness. The Division's order was sustained on the rule

* *St. Vincent's Medical Center of Richmond* v. *State Human Rights Appeal Board,* 59 App. Div. 2d 778, 398 N.Y.S.2d 735 (2nd Dept. 1977), *appeal dismissed,* 44 N.Y.2d 731, —— N.E.2d —— (1978), *appeal denied,* 45 N.Y.2d 705, —— N.E.2d ——.

in *Brooklyn Union Gas Co.* v. *New York State Human Rights Appeal Board,* 41 N.Y.2d 84, 359 N.E.2d 393 (1976).

Petitioner perceives a conflict with the Employee Retirement Income Security Act of 1974, 88 Stat. 832, 29 U.S.C. §§1001 *et seq.,* although the facts of the case date back to 1972 and 1973, and although ERISA does not purport to supersede State legislation relating to plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation laws or unemployment compensation or disability insurance laws." 29 U.S.C. §1003(b)(3); see §1144(a). And although the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. §§2000a *et seq.,* recognizes and preserves State fair employment legislation providing more comprehensive protection to employees, 42 U.S.C. §§2000e-7, 2000h-4, petitioner perceives a conflict with Title VII, 42 U.S.C. §§2000e-1 *et seq.,* and decisions thereunder. Petitioner claims these conflicts sufficient to raise a question under the Supremacy Clause, U.S. Const. Art. VI cl. 2.

The Division respectfully submits, for the reasons set forth below, that petitioner does not raise a substantial Federal question warranting certiorari.

Reasons Certiorari Should Be Denied

I. Petitioner raises no substantial question under ERISA.

Petitioner relies on the supersedure clause in ERISA, 29 U.S.C. §1144(a), and on its legislative history, to substantiate its argument that the courts of New York erred in sustaining the Division's order. This Court has recog-

nized ERISA as a comprehensive Federal regulation preempting State laws but as expressly disclaiming any effect with regard to events antedating January 1, 1975. *Malone* v. *White Motor Corp.*, —— U.S. ——, 55 L.Ed.2d 443, 447 n.1 (1978); see 29 U.S.C. §1144(b), providing that ERISA does not apply to causes of action which arose before that date.

The causes of action in this case arose in 1972 and 1973, when the complainants were disallowed, for periods of disability connected with pregnancy, benefits provided by petitioner uniformly, pursuant to the State Disability Benefits Law, N.Y. Workmen's Compensation Law Art. 9 (McKinney's 1965), for employees disabled otherwise. ERISA does not apply.

But even if ERISA did apply, it would not preempt application of the Human Rights Law in this case. Excluded from the operation of the supersedure clause in ERISA, 29 U.S.C. §1144(a), are employee benefit plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws." §1003(a)(3). The supersedure clause of ERISA permits application of State fair employment legislation to plans like petitioner's which fall within that exclusion. On August 3, 1977, the Disability Benefits Law was amended to impose upon employers in the State of New York, including petitioner, a requirement substantially similar to the requirements of the Division's order. L. 1977 ch. 675 (hereinafter "the DBL Amendments"). The effect of the DBL Amendments is to legislate a mandatory minimum wage replacement benefit for employees disabled by pregnancy. The minimum benefit

is half-pay up to $95 per week. DBL §204.2 as amended, L. 1974 ch. 583 §6. The Division respectfully submits that the question petitioner seeks to raise under ERISA with respect to the Division's order is so easily answered by the provisions of ERISA and the DBL Amendments that nothing is left warranting review by this Court. Substantially, if not entirely, the question is moot.

Even if this Court should perceive some marginal viability in the question petitioner seeks to raise, ERISA would not necessarily preempt application of the Human Rights Law to petitioner's employee benefit plan. ERISA contains a nonimpairment clause indicating Congressional intent to permit application of State fair employment legislation to employee benefit plans:

> "Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law." 29 U.S.C. §1144(d).

Title VII is not mentioned in Sections 1031 and 1137(b), and therefore continues in full force and effect.

No distinction is made in ERISA between the substantive provisions of Title VII, 42 U.S.C. §§2000e-2, 2000e-3, and the numerous provisions recognizing and preserving State and local fair employment legislation and deferring to the jurisdiction and remedial power of agencies enforcing such legislation, 42 U.S.C. §§2000e-4(g)(1), 2000e-5(b)-(e), 2000e-7, 2000e-8(b); see §2000h-4. The nonimpairment clause of ERISA preserves Title VII in its entirety, including provisions permitting application of more stringent State statutes.

During debate on ERISA, an amendment was offered to add a clause prohibiting discrimination. The amendment was dropped after reference was made to the applicability of the prohibitions in Title VII. 119 Cong. Rec. 30409-10 (Sept. 19, 1973); 120 Cong. Rec. 4726 (Feb. 28, 1974).

Rejection by Congress of a nondiscrimination clause in ERISA, and Congressional reliance, in the drafting and enactment of ERISA, upon Title VII and its provisions acknowledging and preserving State fair employment legislation appear to place a heavy burden upon those who would argue that States should play no part in eliminating discrimination in employee benefit plans. See Feerick, "Labor Relations—Birth of a Child," N.Y.L.J. June 3, 1977 p. 1 col. 1 at 26 col. 3. The Division respectfully submits that this is not a case in which that burden can be discharged.

The recent amendment of Title VII to protect the pregnant worker, P.L. 95-555 (hereinafter "the Title VII Amendment") extinguishes the question petitioner has sought to raise. The amendment demonstrates intent on the part of Congress not only to prohibit discrimination against the pregnant worker in terms, conditions and provisions of employment, but also—in the face of ERISA—to continue deferring to State and local fair employment agencies, including the Division, for the initial enforcement of that prohibition through counterparts in State and local law. See Point II, *infra*. As to matters antedating October 31, 1978, the effective date of the Title VII Amendment, the petition retains little if any viability. A pronouncement as to petitioner's rights and responsibilities before that date under the Human Rights Law, the DBL Amendments and

ERISA would be largely academic, engaging this Court in a retrospective exercise made futile by supervening legislation.

II. Petitioner raises no substantial question under Title VII.

Petitioner cites *Geduldig* v. *Aiello,* 417 U.S. 484 (1974), and *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976), to justify its withholding from employees disabled in connection with pregnancy fringe benefits provided by petitioner to employees disabled otherwise. Those cases are not in point.

Aiello upholds under the Equal Protection Clause of the Fourteenth Amendment a California statute excluding disabilities connected with normal pregnancy from coverage of an employee-funded program of disability benefits. In a footnote which is frequently cited and quoted, this Court took care to point out that State legislatures are constitutionally free to include or exclude pregnancy from the coverage of such legislation on any reasonable basis, just as with respect to any other physical condition. 417 U.S. at 496 n.20. Under *Aiello,* therefore, State fair employment legislation may constitutionally be applied to protect pregnant workers from disallowance of employee benefits paid to colleagues who are not pregnant.

Gilbert holds that an employer does not discriminate as to sex in violation of Title VII by excluding pregnancy-related disabilities from fringe benefits provided for other disabilities. Even if this Court were to equate the issue here with the issue in *Gilbert,* it could not hold that Title

VII controls and restricts interpretation of the Human Rights Law. Title VII not only recognizes and preserves State fair employment legislation, but permits such legislation to provide more protection, and more stringent sanctions, than Title VII itself. When the State statute permits what Title VII prohibits there is conflict and Title VII will preempt and supersede. 42 U.S.C. §2000h-4. But when the State statute prohibits what Title VII permits there is no preemption. 42 U.S.C. §2000e-7. States remain free, after as before enactment of Title VII, "to extend the area of non-discrimination beyond that which the Constitution itself exacts," Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 98 (1945).

Like the question under ERISA, the question petitioner seeks to raise under Title VII is extinguished by the Title VII Amendment, which now affords the pregnant worker much of the protection available under the Human Rights Law.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
November 30, 1978

Respectfully submitted,

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